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No. 97-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHEZ SEZ VIII, INC., t/a United Video, DAVID PORTEN, t/a Adult Entertainment Center, HAMILTON AMUSEMENT CENTER, INC., t/a Video Express, L.O.J., INC., t/a The Emporium, and VITO J. FRUGGIERO, INC., t/a Red Barn Books,

Petitioners,

vs.

DEBORAH T. PORITZ, Attorney General for the State of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF PARENT COMPANIES AND SUBSIDIARIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of this Court.

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POINT I

THE SUBJECT NEW JERSEY CRIMINAL STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS CONSTRUED BY THE STATE APPELLATE COURT

Petitioners, owners and operators of adult theme retail book stores and video stores in New Jersey, have attacked the

subject statute[1] as being fatally vague. *Inter alia*, said Act criminalizes activity consisting of operating a sexually oriented business offering the use of booths "which facilitate sexual activity by patrons." However, the statute gives absolutely no guidance as to what kinds of video viewing booths may be found to so facilitate sexual activity.

The New Jersey Superior Court (trial court) agreed with petitioner that §2C:33-12.2(b) is unconstitutionally vague (A-29), and enjoined enforcement thereof (A-31). However, the Appellate Division of the Superior Court [hereinafter "Appellate Division"] reversed, construing the statute in a manner which it deemed to be constitutional (A-16). The New Jersey Supreme Court declined to hear a further appeal by petitioners (A-1).

Respondents, the State of New Jersey and its Attorney General, initially attempt to escape their Act's lack of standards by referring to its legislative history (Respondents' Brief,[2] pp.3-6), and its asserted goal of curbing high-risk sexual conduct leading to the spread of disease (Resp. Brief, p.1). Nevertheless, this Court has only recently reiterated that a statute's laudable purpose does not insulate it from judicial scrutiny under the First Amendment. *Reno v. American Civil Liberties Union*, __ U.S. __, 117 S.Ct. 2329, 2349 (1997) [holding that portions of a federal statute intended to protect children from pornography violated the First Amendment]. Thus, respondents' raising of the spectre of AIDS is not sufficient to overcome a violation of the First Amendment.

Next, respondents assert that the language of a statute need not be specified with "mathematical certainty" (Resp. Brief, p.12). Accordingly, following the Appellate Division, respondents urge a "common sense" approach, trusting "the informed discretion of a reasonable person" (Resp. Brief, p.14; A-21). More, respondents purport to rely on this Court's

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[1] New Jersey Statutes Annotated ["N.J.S.A."] §2C:33-12.2(b).

[2] Hereinafter "Resp. Brief."

opinion in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) [Resp. Brief, pp.11-12].

In their reliance, respondents have seriously misconstrued the import of *Grayned*. In that seminal decision, this Court declared:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." (408 U.S. at 108-09; footnotes omitted)

Accord, *Schenck v. Pro-Choice Network of Western New York*, __ U.S. __, 117 S.Ct. 855, 869-70 (1997) [Following *Grayned*; persons of "ordinary intelligence" must be given "a reasonable opportunity to know what is prohibited"].[3]

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[3] In a criminal statute such as the present, First Amendment concerns are heightened due to the "increased deterrent effect," and the "'risk of

(Footnote continued)

Here, that requirement has not been met. Rather than setting forth prohibited conduct which proprietors of regulated establishments must avoid, the subject statute simplistically proscribes booths or other devices "which facilitate sexual activity by patrons."

The Appellate Division apparently recognized the infirmity inherent in such amorphous language. It conceded that unlike the analogous statutes enacted by other jurisdictions, New Jersey's subject provision does "not [specify] physical requirements." (A-17) Instead, as construed by that court, the Act was found to encompass the physical requirements of other jurisdictions. That is, viewing booths satisfying the enclosure laws of other unspecified states and municipalities would be lawful in New Jersey as well (A-17).

Respondents adopt this analysis as their own. They argue that §2C:33-12.2(b) accomplishes the same result as other jurisdictions seeking to bar viewing booths which facilitate sexual activity by patrons -- particularly Delaware (Resp. Brief, p.13). However, that argument fails.

Statutes in other jurisdictions regulating video viewing booths generally specify exactly what is required and/or prohibited. For example, respondents refer to *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993), upholding the constitutionality of Delaware's regulations for viewing booths (Resp. Brief, pp.4-5). However, as conceded by respondents (Resp. Brief, p.4), title 24 of the Delaware Code Annot., as relevant, proscribes:

> Booths ... used for the viewing of motion pictures or other forms of entertainment, having doors, curtains or portal partitions, unless such *booths ... shall have at least one side open to an adjacent public room* so that the area inside is visible to persons in adjacent public rooms. [§1633(b)(2); emphasis added]

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discriminatory enforcement of vague regulations.'" *Reno v. American Civil Liberties Union*, __ U.S. __, 117 S.Ct. 2329, 2345 (1997).

Thus Delaware, unlike New Jersey, expressly mandates what kind of booths are unlawful. Moreover, in comparing their respective statutes, even respondents concede that relative to Delaware, New Jersey "used more general terms" (Resp. Brief, p.13).

To the same effect is *Berg v. Health & Hospitals Corp.*, 865 F.2d 797 (7th Cir. 1989), relied upon by the Appellate Division (A-20) and respondents (Resp. Brief, p.16). There, the ordinance in question expressly required that the interior of viewing booths be visible from an adjacent public room (865 F.2d at 800).

In fact, the specific requirements of analogous zoning ordinances substantially vary among jurisdictions. Thus, some regulations mandate removal of booth doors, *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 645 N.Y.S.2d 951 (4th Dept. 1996); *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991), some regulations require the interior of booths to be visible from an adjacent public room, *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993); *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990), some regulations demand interior visibility from a main aisle, *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990), while others mandate booth visibility from "common areas," *Grunberg v. Town of East Hartford*, 736 F.Supp. 430 (D.Conn. 1989), *affd*, 901 F.2d 297 (2d Cir. 1990).

Contrariwise, the subject provision has no specific requirements. Instead, the Appellate Division declared:

> New Jersey's statute embraces all the physical requirements of other jurisdictions, and *leaves it to each proprietor to design a viewing area* which will not facilitate sexual activity. (A-17; emphasis added)

Respondents embrace the same rationale (Resp. Brief, p.13).

Here, by its own terms, the subject statute contains no express guidance. As construed by the Appellate Division, it includes a veritable grab bag of configurations for the operator of protected[4] adult video stores to choose from -- at his peril. Even worse, the police have seemingly unfettered discretion to decide which jurisdiction's requirements should have been followed, in the event that censorship of free expression is sought.

Petitioners submit that this call to each business to design its own booths, and each law enforcement officer to employ his own discretion (Resp. Brief, pp.14-15), cannot conceivably comport with this Court's command in *Grayned*, *supra*, that: "[L]aws must provide explicit standards for those who apply them" (408 U.S. at 108). As ringingly summed up by the trial court in this very case:

> If the legislature is of the view that an open side to the video booths prevent them from facilitating sexual activity, as many other jurisdictions do, it should say so. Operators of premises which have video booths would then be able to conduct themselves in accordance with the statute. As it currently stands, one must speculate as to whether or not his conduct is proscribed. That is constitutionally impermissible. (A-30)

Respondents agree that pursuant to Rule 10(c), a writ of certiorari may be granted where a state court "has decided a federal question in a way that conflicts with applicable decisions of this Court" (Resp. Brief, p.9). Here, the decision of the Appellate Division flies in the face of *Grayned* and its progeny, and should be reversed.

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[4] Non-obscene sexual expression is protected by the First Amendment. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

POINT II

THE SUBJECT NEW JERSEY CRIMINAL STATUTE IS CONTENT-BASED, AND SHOULD HAVE BEEN SUBJECT TO STRICT SCRUTINY ANALYSIS

The instant statute, by its very terms, applies only to one who "owns or operates a sexually oriented business ..." (N.J.S.A. §2C:33-12.2(b)). Thus, it is not content-neutral. A statute which was actually neutral on this issue would apply to any business containing video viewing booths which somehow facilitates sexual activity by patrons. As pointed out by the trial court herein, a facility showing only "Rebecca of Sunnybrook Farm" in enclosed video booths would not be subject to the statute (A-27). On the other hand, facilities showing the adult film classic "Debbie Does Dallas" in enclosed booths could be prosecuted, based on the content of said movie.

Respondents attempt to counter this point by arguing that the New Jersey statute does not ban viewing adult material; rather, it merely "prohibits sexually oriented businesses from providing booths which facilitate sexual activity by patrons" (Resp. Brief, p.18). But that is exactly the problem. Businesses that do not regularly sell goods or services of an adult nature are free to otherwise facilitate sexual activities by their patrons and not run afoul of the statute.

Respondents further contend that the statute is content-neutral since it is not aimed at suppressing speech (Resp. Brief, p.18). However, such a simplistic approach has been rejected. In *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994), this Court ruled that a governmental assertion of a content-neutral purpose cannot save a statute which clearly discriminates based upon content.

In this regard, it is noteworthy that in *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993), relied upon by both respondents and the Appellate Division, the open booth statute in question applied to "any commercial building, structure, premises or portions thereof" (10 F.3d at

139), not just to sexually oriented businesses. *Accord, Berg v. Health & Hosp. Corp.*, 865 F.2d 797, 806 (7th Cir. 1989) [Booth ordinance applicable to all commercial premises].

Here, the Appellate Division expressly analyzed the statute under the lesser content-neutral "time, place and manner" standard wherein the test is "whether a substantial government interest would be 'achieved less effectively absent the regulation' (citations omitted)" (A-16). That test was found satisfied. It is beyond question, however, that if this Court should find the subject statute to be content-based, it would instead be subject to "the most exacting scrutiny." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Under the circumstances, such scrutiny would be fatal.

CONCLUSION

A state statute wherein criminal penalties for violation is dependent upon the "informed discretion" of a potential violator, and the officer enforcing the statute, should not be allowed to stand.

For the foregoing reasons, and as previously set forth, petitioners request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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